UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10

PRO ELECTRIC, INC.,

Employer

and Case 10-RC-15302

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION No. 136,

Petitioner

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

Pro Electric, Inc., the Employer herein, an Alabama corporation with its principal place of business located in Huntsville, Alabama, is engaged in the business of electrical subcontracting.[1] The Petitioner, International Brotherhood of Electrical Workers Local Union No. 136, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent a unit of all regular full-time and regular part-time electricians and helpers employed by the Employer, but excluding all temporary employees, clerical employees, sales

[1] The parties stipulated and I find that the Employer is an electrical subcontractor in the construction industry and, therefore, voter eligibility is properly determined by the Board's Steiny/Daniel formula. Steiny & Company, Inc., 308 NLRB 1323 (1992); Daniel Construction Co., 133 NLRB 264 (1961), as modified at 167 NLRB 1078 (1967).

persons, professional employees, guards and supervisors as defined in the Act.[2] A hearing officer of the Board held a hearing and the Employer filed a post-hearing brief with me.

As evidenced at the hearing and in the Employer's brief, there are two issues herein[3]: (1) whether the 9 electricians and helpers locally hired by the Employer to work at the Lowe's Home Improvement Center project in Gadsden, Alabama are "temporary" employees and are therefore ineligible to vote under Steiny[4]; and (2) whether one of these "temporary" employees, Lee Graham, is ineligible to vote on the additional ground that he is a voluntary unpaid Union organizer.

The Employer, contrary to the Petitioner, claims the employees working in Gadsden are ineligible to vote because: (1) they were hired only for the Lowe's project in Gadsden; (2) they will be laid off in early September, 2002 when the project is completed; and (3) they have no reasonable expectation of recall. The Employer, contrary to the Petitioner, claims that Graham, one of the "temporary" employees at Gadsden, is also ineligible on the additional ground that he is a voluntary unpaid Union organizer who "has not the slightest intention whatsoever of being employed by . . . [the Employer] in the future," and therefore does not share a community of interest with other unit employees.

I have considered the evidence and the arguments presented by the parties on each of these two issues. As discussed below, I have concluded that the Employer

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[2] The unit sought reflects the parties' stipulation at the hearing.

[3] At the close of the hearing, the Petitioner withdrew its contention on the third issue raised at the hearing, that Michael Joyner is a supervisor within the meaning of Section 2(11) of the Act, thus obviating the need for a decision on this issue.

[4] The names of these employees are: Brent Hammond; Brian Roberts; Charles Battles; Lee Graham, Jerry Cambron; Dwayne Osbald; Jerry Easter; Michael Prickett; and Terry Swiney.

has failed to show that the Steiny formula should not be applied to any of the 9 named employees working for the Employer at the Lowe's project in Gadsden, including unpaid Union organizer Graham, or that any of these 9 employees is ineligible to vote, subject to application of the Steiny/Daniel formula. Accordingly, I have directed an election in the petitioned-for unit[5], and have directed that the Steiny/Daniel formula be applied for eligibility purposes. There are approximately 40 unit employees.

To provide a context for my discussion of these issues, I will first provide an overview of the Employer's operations. I will then present in detail the facts and reasoning that support each of my conclusions on the issues.

I. OVERVIEW OF THE EMPLOYER'S OPERATIONS

The Employer is an electrical subcontractor located on Poole Drive in Huntsville, Alabama. It serves as a subcontractor to general contractors on commercial projects, and also performs some servicing and repair work in the Huntsville area. The Employer's operations are run by Gary Hillis, President; Robert Walker, Secretary-Treasurer; and Johnny Fairbanks, superintendent.[6] Approximately 30 unit employees are employed at the Huntsville facility, including approximately 15 regular full-time and 15 regular part-time electricians and helpers.[7] From time to

[5] The Employer claimed, for the first time in its brief, that the petition should be dismissed consistent with the Board's longstanding policy with respect to contracting units. However, I find that a substantial and representative complement of the Employer's employees will continue to remain employed after completion of the Lowe's project in Gadsden and therefore reject the Employer's contention that the petition should be dismissed. See MJM Studios of New York, Inc., 336 NLRB No. 129 (2001), sl. op. at 2; and construction industry cases cited in Employer's brief.

[6] At the hearing, the parties stipulated and I find that Hillis, Walker and Fairbanks are supervisors within the meaning of Section 2(11) of the Act and are therefore excluded from the unit.

[7] Full-time and part-time employees earn approximately the same wages. Full-time employees work 40-hour weeks. Part-time employees work 8 to 10-hour days, evidently ranging from 50 to 120 days per year.

time, the Employer also employs locally-hired electricians and helpers for projects outside the Huntsville area, including the 9 employees working in Gadsden alleged to be "temporary" employees.

Over the last 10 years, the Employer has established an ongoing non-exclusive relationship with McWhorter Construction Company, the general contractor for Lowe's Home Improvement Center projects. As a result, the Employer has bid on, and has been awarded, a number of jobs to do electrical work for newly-constructed Lowe's stores in various cities in Alabama, including Guntersville, Muscle Shoals, Decatur, North Huntsville, and most recently in Gadsden.[8] In recent years, the Employer has made bids on an average of 8 to 10 Lowe's jobs per year, and has been awarded one or two Lowe's jobs per year. The work on these stores is usually completed within 90 to 120 days, and is performed by a handful (i.e., 3 to 5) of regular full-time and regular part-time employees taken from Huntsville, as well as by 8 to 10 employees who are hired locally to work on each of the projects.[9] According to the Employer, the locally-hired employees are laid off after work on the job is completed.

Over the last 10 years, the Employer has hired a total of about 60 to 70 employees locally to work on the Lowe's jobs it has been awarded. No payroll records (or summaries thereof) of any kind were offered in evidence at the hearing and the record does not disclose whether any of these 60 to 70 locally-hired

[8] Each of these locations is within a 1 to 2-hour drive from Huntsville, less than 100 miles. See Alabama State Map, published by Rand McNally.

[9] The Employer evidently hires local employees because it needs employees who hold local licenses to perform electrical work in these localities. The Employer also saves expense reimbursements by hiring locally. The local employees are generally paid a somewhat higher wage rate than "regular" employees.

employees has worked on more than one Lowe's project for the Employer, or whether any of these locally-hired employees has ever been recalled or offered another assignment subsequent to completion of the initial job for which he was hired.[10] Though the Employer is emphatic in its post-hearing brief that none of these locally-hired employees was ever converted to "regular" status by the Employer, the testimony is equivocal.[11] Further, it is not clear whether any of these 60 to 70 employees (except the 9 employed at Gadsden discussed below) has worked for the Employer at all within the last two years.

II. STATUS OF THE 9 GADSDEN EMPLOYEES

The 9 employees named above were hired by the Employer some time in May, 2002 to work on the Lowe's project in Gadsden. Johnny Fairbanks, the Employer's Superintendent, testified that he interviewed and hired these employees after he sought out job applicants through the state unemployment service, through placement of local newspaper advertisements[12] and through word-of-mouth. Apparently, none of the 9 had worked for the Employer prior to hire for the Gadsden job. Each

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[10] The Employer asserts, in its post-hearing brief, that "**None have ever been re-employed by . . . [the Employer] on any basis.** (TR 55-7)" [Emphasis in original.] However, a close reading of the testimony covered in the cited pages fails to support this sweeping assertion. Robert Walker, the Employer's Secretary-Treasurer, was not asked by Employer counsel (or the hearing officer) whether any of these employees had ever worked on more than one Lowe's project, or whether any of these employees had ever been offered the opportunity to work on more than one Lowe's project, or whether any of these employees had ever worked for the Employer again in any other capacity.

[11] Robert Walker, the Employer's Secretary-Treasurer, initially replied, in response to the Hearing Officer's question whether any of these employees had been converted to regular Huntsville employees, "I really can't remember. I don't believe there has been. . . You know there's always a possibility, but I mean I – just right off the top of my head, I can't think of one, no." When the hearing officer specifically asked, "You're saying that all of these people that you've hired for the Lowe's store will never become regular part-time," Walker replied, "I never said that." Elsewhere in his testimony he stated that it was "possible", because "it's construction." Elsewhere in his testimony he said he did not remember whether any of the employees had been offered the opportunity to "convert to . . . on-call part-time or regular" full-time status.

[12] The advertisements did not mention the word "temporary." The text stated, "Electricians and helpers wanted, must have valid Gadsden City license, apply in person."

employee was required to fill out the Employer's standard employment application, and was given a copy of the Employer's standard employee handbook upon hire.[13]

Fairbanks testified he could not remember what he told each employee about the duration of the job, but testified, "I'm sure I said something like our key turnover date is the 4th of September." None of the employees was told that the job was "temporary" at the time of hire. There was no discussion, according to the Employer, one way or the other, about continuing employment after the Gadsden job is completed.

The record reflects that the 9 employees work side-by-side with the regular full-time and regular part-time employees brought in from Huntsville. They share the same supervision, are paid at an hourly rate, use the same tools, do the same work, work the same hours, and are evidently eligible for the same benefits (subject to length of employment[14]) as regular employees. Superintendent Fairbanks acknowledged that he has spoken to these employees about "different jobs and stuff . . . that might or might not be upcoming," including another Lowe's store scheduled to be built in Fort Payne, about 70 miles from Huntsville.[15] However, the Employer asserted at the hearing that it does not currently have any Lowe's jobs under bid, and any discussion regarding future Lowe's jobs is mere speculation.[16]

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[13] Neither of these documents refers to "temporary" employment, or "temporary" employees; both documents are used, as well, for the Employer's "regular" employees.

[14] According to the standard employee handbook, employees have to work 90 to 180 days (or more) to qualify for paid holidays, health insurance, and paid vacation.

[15] One of the employees (Lee Graham) testified that at the time of hire he was told by Fairbanks that the company "was bidding another Lowe's in Fort Payne and two or three in Birmingham."

[16] There is no evidence that the Employer intends to terminate its relationship with the Lowe's general contractor, or cease making bids on Lowe's jobs.

DISCUSSION – THE APPROPRIATE LEGAL STANDARD

The Board has long recognized the usefulness and appropriateness of a formula in determining eligibility in the construction industry, specifically noting that the construction industry differs from many other industries in the way it hires and lays off employees. The Board reaffirmed these principles in Steiny & Co., supra at 1324, in which it recognized that "construction employees may experience intermittent employment, be employed for short periods on different projects, and work for several different employers during the course of a year." The Board also noted the "fluctuating nature and unpredictable duration of construction projects" and the differences in hiring patterns of construction employers. Steiny, supra at 1324, 1327. Some construction employers hire project-by-project; some have a so-called stable or core group of employees; and some employers, like the Employer herein, use a "hybrid" pattern of project-by-project hiring coupled with core group hiring.

Regardless of the hiring pattern used by a construction employer, the Board requires that the Steiny formula be applied in virtually all cases.[17] Further, the Board has indicated that an employer who opposes application of the formula has the burden of showing that the formula should not be applied in a particular case or to particular employees. See Wilson & Dean Construction Co., Inc., 295 NLRB 484 (1989). In my judgment, the Employer has failed to make such a showing here with respect to the 9 disputed Gadsden employees. In reaching this conclusion, I am persuaded by the following factors.

[17] One exception to application of the formula is where there is clear proof that the employer operates only on a seasonal basis. See Dick Kelchner Excavating Co., 236 NLRB 1414, 1416 (1978), cited with approval in Steiny, supra at 1328.

First, it is undisputed that none of the 9 employees was told his employment was "temporary" at the time of hire. In fact, the Employer, by words and deeds, may have suggested the opposite. For example, the Employer's Superintendent acknowledged telling employees about jobs that might be upcoming, including the Lowe's store in Fort Payne. This may have been mere speculation, as the Employer contends, but it also suggested the possibility of additional work, rather than the opposite, after completion of the Gadsden job some time in September.

Second, the employees were given nothing in writing which stated they would not be eligible for future jobs after the Gadsden store was completed. The advertisements placed by the Employer for the Gadsden jobs said nothing about "temporary" employment. Moreover, the 9 employees, at the time of hire, were given company documents (i.e., employment application and employee handbook) which did not refer to "temporary" employees, and did not describe any differences between so-called "temporary" and "regular" employees.

Third, it is clear that the 9 disputed employees otherwise share a community of interest with other company employees working at the Gadsden store. As I indicated above, they work side-by-side with employees brought in from Huntsville. They work the same hours, under the same supervision, using the same tools on the same work, and are eligible for the same benefits (subject to length of employment) as regular employees. Accordingly, they share an interest with other employees in the determination of terms and conditions of employment with the Employer.

Considering all of the above factors, the Employer has not demonstrated that the 9 disputed employees are "temporary", or that the Steiny formula should not be

applied in determining their eligibility to vote. Accordingly, I find that the 9 disputed employees are eligible to vote, subject to application of the formula[18].

III. STATUS OF UNION ORGANIZER LEE GRAHAM

As I noted above, the Employer claims, contrary to the Petitioner, that Lee Graham, one of the 9 disputed employees discussed above, is also ineligible on the additional ground that he is a voluntary Union organizer who "has not the slightest intention whatsoever of being employed by . . . [the Employer] in the future." I have concluded that it is appropriate to apply the Steiny formula in Graham's case (as discussed above), and I hereby reject the Employer's argument that Graham is ineligible to vote as a voluntary Union organizer. In reaching this conclusion, I have considered the following facts and applicable law.

Graham testified that he applied for the job with the Employer because the Union's President told him the Union wanted to "salt the job."[19] He visited the site, submitted an application, obtained a Gadsden city license, and was hired immediately thereafter. It appears from the record that Graham works under the same terms and conditions as the other employees, including the same hours, supervision, and eligibility for benefits. He is a voluntary organizer for the Petitioner, and receives no pay from the Union. He has taken a Union organizing course, on his own time and

[18] I reject the Employer's argument, in Brief, that the application of the Steiny formula contemplates that there be proof that the employees have an expectation of recall. It was the Board's attempt in S.K. Whitty Co., 304 NLRB 776 (1991) to devise a construction industry formula that identified employees with a reasonable expectation of future employment. On abandoning the S.K. Whitty formula the Board said it would return the focus to whether the length of employment, despite the absence of recurrent employment, nevertheless evidenced that the employee had a direct and substantial interest in the selection of a representative. Here the 9 Gadsden employees who have worked since May certainly have that direct and substantial interest. Steiny, supra

[19] Graham is a member of the Petitioner and usually seeks work through the Union hall.

for no pay. On June 26, 2002, a few weeks before the instant petition was filed, the Petitioner advised the Employer in writing that Graham is a "Voluntary Union Organizer for IBEW, Local Union 136 [sic]", and that "he will abide by all rules and regulations" of the Employer.

In NLRB v. Town & Country Electric, 516 US 85 (1995) the Supreme Court affirmed the Board's view that paid Union organizers are employees within the meaning of Section 2(3) of the Act and thus are entitled to the protection of the Act. The Board recognized, however, in the underlying Town & Country case, 309 NLRB 1250, 1257 (1992), that the organizer's status as a statutory employee does not, however, ensure his right to vote. Employee status is not synonymous with voter eligibility. As stated in Oak Apparel, Inc., 219 NLRB 701 (1975), this distinction has been recognized since the infancy of the administration of the Act.

The mere fact that Graham is a voluntary Union organizer, however, does not automatically render him ineligible to vote. Thus, Graham is not automatically ineligible even if, as the Employer contends, the only reason he sought employment was to help the Union in its organizing campaign. Rather, the Board applies a traditional community of interest test in the case of Union organizers. Pursuant to this test, paid Union organizers may be excluded on traditional grounds, e.g., that they are temporary employees or because their interests sufficiently differ from those of their co-workers. Sunland Construction Co., 309 NLRB 1224, 1229 (1992); Multimatic Products, 288 NLRB 1279 (1988); Oak Apparel, supra; Dee Knitting Mills, 214 NLRB 1014 (1974).

As I have already concluded above, the Employer has not demonstrated that Graham, as one of the 9 disputed locally hired employees, is a "temporary" employee and thus ineligible to vote. Nor am I persuaded by the Employer's argument that Graham's testimony shows that his tenure is "temporary" and that he "has not the slightest intention whatsoever of being employed by . . . [the Employer] in the future." The only evidence on this point is as follows.

Graham testified, on cross-examination by the Employer, that he would remain with the Employer if it "went union." He indicated he hoped to stay with the Employer and told Superintendent Fairbanks he wanted to work at the Fort Payne job if the company "went union." Graham testified the only reason he was permitted by the Petitioner to work for the Employer, a non-union company, was because the Petitioner wanted his help to organize the workers. He testified he believes as a Union member he would not be permitted to stay with the Employer if the company did not "go union."

In my view, the foregoing evidence is equivocal, at best, and does not establish that Graham intends to voluntarily quit the Employer's employ in the near future. In any event, it has long been held that employees who have given notice of intent to quit or retire, but are still on the payroll at the time of the election are entitled to vote. Reidbord Bros. Co., 99 NLRB 127, 129 (1952); Radio Free Eur./Radio Liberty, 262 NLRB 549, 551 (1982); Amoco Oil Corp., 289 NLRB 280 (1988). Further, there is no evidence that Graham's employment with the Employer is part of an attempt by Petitioner to "pack the unit" with "functionaries." Town & Country, 309 NLRB at 1257; see also Windsor Castle Health Care Facilities, 310 NLRB 579, fn. 2 (1993).

Graham is simply a voluntary "salt", who shares a community of interest with other unit employees working under the same terms and conditions. Considering the above factors, the Employer has not demonstrated that Graham is ineligible to vote based on the additional ground that he is a voluntary Union organizer.

IV. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act and claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act.

> All electricians and helpers employed by the Employer, but excluding all temporary employees, clerical employees, sales persons, professional employees, guards and supervisors as defined in the Act.[20]

[20] The unit description is substantially in accord with a stipulation of the parties.

V. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by International Brotherhood of Electrical Workers Local Union No. 136. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who are employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, or on vacation, or temporarily laid off. Also eligible to vote shall be all employees in the unit who have been employed for a total of 30 working days or more within the period of 12 months preceding the eligibility date for the election hereinafter directed, or who have had some employment in that period and who have been employed 45 working days or more within the 24 months immediately preceding the eligibility date, and who have not been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed. Also eligible are employees engaged in an economic strike that began less than 12 months before the election date and who retained their status as such during the eligibility period and the replacements of those economic strikers. Unit employees in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2)

striking employees who have been discharged for cause since the strike began; and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969). Accordingly it is hereby directed that within seven (7) days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. North Macon Health Care Facility, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Birmingham Resident Office, Suite 3400 Ridge Park Place, 1130 22nd Street, South, Birmingham, Alabama, 35205-2870 on or before **August 26, 2002**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed.

The list may be submitted by facsimile transmission at (205) 731-0955. Since the list will be made available to all parties to the election, please furnish a total of **two** copies, unless the list is submitted by facsimile in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice

VI. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, DC

20570-0001. This request must be received by the Board in Washington by 5:00 P.M., (EST) on **September 3, 2002**. The request may **not** be filed by facsimile.

Dated at Atlanta, Georgia, on this 19th day of August 2002.

/s/ Martin M. Arlook

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